



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: JANUARY 18, 2023

IN THE MATTER OF:

Appeal Board No. 626331

PRESENT: RANDALL T. DOUGLAS, MEMBER

The Department of Labor issued the initial determination, holding the claimant ineligible to receive benefits, effective August 8, 2022, through December 11, 2022, due to receipt of dismissal pay. The claimant requested a hearing.

The Administrative Law Judge held a telephone conference hearing at which testimony was taken. There was an appearance by the claimant. By decision filed October 7, 2022 (), the Administrative Law Judge sustained the initial determination.

The claimant appealed the Judge's decision to the Appeal Board.

Our review of the record reveals that the case should be remanded to hold a further hearing.

Labor Law § 591(6)(c) provides that the "amount of dismissal pay shall be

allocated based on the claimant's actual weekly remuneration paid by the employer during his or her employment or, if such amount cannot be determined, the amount of the claimant's average weekly wage for the highest calendar quarter (emphasis added)." As the claimant testified that he had also earned commissions and bonus payments, the sole use of his base salary may not truly represent his actual weekly remuneration. As a result, the claimant should be afforded an additional opportunity to submit testimony and other evidence as to his bonus structure and commission payment, and offer any documentary evidence relevant to such calculation.

In the event that the claimant's actual weekly remuneration cannot be determined, the claimant's weekly wage shall be calculated based upon his average weekly wage for the highest calendar quarter in his base period as reported to the Department of Labor. (See Labor Law § 591(6)(c); and Appeal

Board Nos. 589557, and 589460). The Administrative Law Judge shall confront the claimant with the claimant application information screen, LO801, pages 13-15, marked as Hearing Exhibit 2 at the previous hearing, and in particular, page 15, which lists his quarterly earnings within his base period, and then afford the claimant the opportunity for objection and comment thereon prior to re-entrance of such documentation into the record.

Now, based on all of the foregoing, it is

ORDERED, that the decision of the Administrative Law Judge be, and the same hereby is, rescinded; and it is further

ORDERED, that the case shall be, and the same hereby is, remanded to the Hearing Section to hold a hearing on the issues ONLY, upon due notice to all parties and their representatives; and it is further

ORDERED, that the hearing shall be conducted so that there has been an opportunity for the above action to be taken, and, so that at the end of the hearing, all parties will have had a full and fair opportunity to be heard; and it is further

ORDERED, that an Administrative Law Judge shall render a new decision, on the issue, which shall be based on the entire record in this case, including the testimony and other evidence from the original and the remand hearings, and which shall contain appropriate findings of fact and conclusions of law.

RANDALL T. DOUGLAS, MEMBER